ISSUED APRIL 18, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

MARY F. CIANCIOLA dba Round-Up Bar 330 Highland Avenue National City, CA 91950, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7382 File: 42-64836 Reg: 98043703 Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria Date and Place of the Appeals Board Hearing: February 3, 2000 Los Angeles, CA

Mary F. Cianciola, doing business as Round-Up Bar (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked her license for appellant permitting her employee and others to sell or conduct negotiations to sell in the licensed premises, on several occasions, a controlled substance (methamphetamine), such acts being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from violations of Business and Professions Code §24200.5, subdivision (a), and Health and Safety Code §11379, subdivision (a).

[1]The decision of the Department under Government Code §11517, subdivision (c), dated March 30, 1999, is set forth in the appendix, as is the Proposed Decision of the administrative law judge, dated October 14, 1998.

Appearances on appeal include appellant Mary F. Cianciola, appearing through her counsel, William R. Winship, Jr., and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine public eating place license was issued on April 2, 1979. Thereafter, the Department instituted an accusation against appellant charging that, on various dates in February, March, and April 1997, she permitted her employee, Maria Estela Arreola (Arreola), and several patrons to sell or negotiate the sale of methamphetamine, a controlled substance.

An administrative hearing was held on September 29, 1998, at which time appellant stipulated that the facts alleged in Counts 1 through 13 of the Accusation were true and correct. Appellant then presented evidence in mitigation of the penalty of outright revocation recommended by the Department.

Subsequent to the hearing, the ALJ issued his Proposed Decision which determined that the license should be revoked, but the revocation stayed for 180 days to permit the transfer of the license to a person or persons acceptable to the Department. The license was also ordered suspended for 60 days and indefinitely thereafter until the license was transferred. If the license was not transferred before the end of the stay, the Director could order the license revoked immediately.

On December 24, 1998, the Department issued a Notice Concerning Proposed Decision which advised appellant that the Department considered, but did not adopt, the Proposed Decision of the ALJ, and that the Department itself would

decide the matter pursuant to Government Code §11517, subdivision (c). Appellant was given an opportunity to submit written argument to the Department, which she did on January 21, 1999.

On March 30, 1999, the Department issued its decision pursuant to Government Code §11517, subdivision (c). The Department adopted Findings I, II, and V of the ALJ's Proposed Decision and made new Findings III and IV. It adopted Determinations I through XIII and made additional Determinations XIV and XV. Appellant's license was then ordered revoked.

Appellant thereafter filed a timely notice of appeal. In her appeal, appellant raises the following issues: (1) the evidence adduced at hearing overwhelmingly showed that appellant did not participate in, and had no awareness of, the drug sales on the premises, negating any possible presumption of permission arising under Business and Professions Code §24200.5, subdivision (a); and (2) even if appellant is held to have "knowingly permitted" the drug transactions, the conditional revocation ordered in the ALJ's Proposed Decision complies with the mandatory revocation of Business and Professions Code §24200.5, subdivision (a), and is clearly equitable under the circumstances of this case.

DISCUSSION

I

Appellant contends that since she did not participate in, had no knowledge of, nor had any reason to be aware of, the drug transactions occurring in the premises, she should not be considered to have "knowingly permitted" the drug transactions.

Business and Professions Code §24200.5, subdivision (a), provides:

> "Notwithstanding the provisions of Section 24200, the department shall revoke a license upon any of the following grounds:
> (a) If a retail licensee has knowingly permitted the illegal sale, or negotiations for such sales, of narcotics or dangerous drugs upon his licensed premises. *Successive sales, or negotiations for such sales, over any continuous period of time shall be deemed evidence of such permission.* . . ." (Emphasis added.)

Appellant's argument that she presented evidence sufficient to overcome the presumption of permission arising from successive sales must fail. The presumption of permission in §24200.5 was discussed in Endo v. State Board of Equalization (1956) 143 Cal.App.2d 395 [300 P.2d 366] and Kirchhubel v. Munro (1957) 149 Cal.App. 2d 243 [308 P.2d 433]. In Endo, the licensee argued that the statutory presumption was outweighed by the evidence, which consisted of

> "the licensee's denials of knowledge . . . the secretive nature of these sales, the fact that the narcotics sold were not kept upon the premises . . . the failure of the officer to inform the licensee after making a purchase, and the fact that for seven years . . . this place was operated without complaint of any kind heretofore made concerning it. " (300 P.2d at 369.)

The court responded that

> "it is not our function, as a reviewing court, to weigh the evidence. The evidence (including the statutory presumption) which supports the finding is substantial: Sales made on the 17th, 18th, and 20th of a given month by the very person the licensee had put in charge of the place, and the readiness with which he made them, token an established and thriving narcotics business conducted at this bar by the manager of the licensed on-sale liquor business."

The situation in the present appeal is similar to that in Endo: Maria Arreola, whom appellant hired as night manager and bartender, sold, or negotiated for sales of, methamphetamine on February 12, 19, 25; March 5, 18, 24, 25; and April 8 and 21, 1997. In addition, three patrons sold, or negotiated for sales of,

methamphetamine on various dates in February and March. These transactions clearly were "successive sales" which raised the presumption of knowledge by appellant as provided by the statute. The "evidence" presented by appellant here is remarkably similar to that presented by the licensee, and rejected by the court, in Endo.

The presumption in §24200.5 was attacked in Endo, supra, as unconstitutional as applied to the licensee in that case, "who claimed to have no personal knowledge of the illegal sales of narcotics in the licensed premises." The court held that there was "a rational connection between the proven illegal sales and the knowing permission presumed therefrom." (300 P.2d at 370.)

The court in Kirchhubel, supra, said of the §24200.5 presumption:

> "The Legislature has power to provide for such a presumption if there is a natural and rational evidentiary relation between the facts proved and those presumed. Having in mind that the power to regulate the liquor business is a very broad one, there is a natural and rational evidentiary relation between a showing that there have been successive sales of narcotics over a continuous period on licensed premises and the very natural conclusion that the sales could not have continued without the implied or express consent of the licensee." (308 P.2d at 436.)

The court in Endo, supra, also pointed out that an alternative ground for discipline existed because a licensee is subject to the principle of imputed liability for the acts of his or her employees: "appellant as . . . licensee is responsible for the acts of her bartender who 'knowingly permitted' the illegal sales by conducting them himself."

Appellant was only present at the premises during the day, apparently leaving the management of the business entirely up to Maria Arreola from at least

6 p.m. to 2 a.m. A licensee cannot use his or her absence from the premises to escape liability for illegal acts that take place in the premises:

> "The licensee, if he elects to operate his business through employees must be responsible to the licensing authority for their conduct in the exercise of his license, else we would have the absurd result that liquor could be sold by employees at forbidden hours in licensed premises and the licensees would be immune to disciplinary action . . . . Such a result cannot have been contemplated by the Legislature." (Mantzoros v. State Board of Equalization (1948) 87 Cal.App. 2d 140 [196 P.2d 657].)

Appellant's contention that she did not "knowingly permit" the drug transactions as alleged in the accusation is rejected.

II

Appellant contends that even if she must be considered to have "knowingly permitted" the drug transactions, the conditional revocation ordered in the Proposed Decision is appropriate and equitable under the circumstances, and the outright revocation ordered by the Department's decision under Government Code § 11517, subdivision (c), "is not only heavy-handed, but wholly inequitable in light of the licensee's conceded lack of knowledge of the underlying conduct within the premises." (App. Opening Br. at 7.)

The Appeals Board will not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. (Martin v. Alcoholic Beverage Control Appeals Board & Haley (1959) 52 Cal.2d 287 [341 P.2d 296].) However, where an appellant raises the issue of an excessive penalty, the Appeals Board will examine that issue. (Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

The Department decision states that

> "The facts of this case, and the reasonable inferences to be drawn from them, especially the pattern of drug trafficking in the premises by a premises employee and patrons during the evening hours, lead to the conclusion that the public can be protected only by preventing an alcoholic beverage licensed business from continuing at the premises location for some length of time into the future."

The Department is granted great discretion in imposing penalties. Even though "reasonable minds might differ as to the propriety of the penalty imposed, . . . this fact serves only to fortify the conclusion that the Department acted within the broad area of discretion conferred upon it." (Martin v. Alcoholic Beverage Control Appeals Board. (1959) 52 Cal.2d 287 [341 P.2d 296, 300-301].) The outright revocation may appear harsh, but it is not an abuse of discretion.

ORDER

The decision of the Department is affirmed.[2]

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

---

[2]This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code §23090 et seq.